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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JANUARY TERM, 1986

GEORGE HAMM,

Petitioner,

v.

DEKALB COUNTY and
PAT JARVIS, SHERIFF,

Respondents.

On Writ of Certiorari to the United States Court of Appeals, Eleventh Circuit

Petition For Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Whether conditions of prison confinement should be reviewed in their totality to assess constitutional deprivations with respect to a pretrial detainee and subsequent prisoner in contravention of the eighth and fourteenth amendments to the Constitution of the United States?

2. Whether the standard of confinement applicable to pretrial detainees pursuant to the due process clause of the fourteenth amendment is the same as that required by the eighth amendment for convicted prisoners?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below subject to this petition for writ of certiorari are set forth in the caption of the petition.

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IN THE
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No. _____

George Hamm,

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DeKalb County and
Pat Jarvis, Sheriff,

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On Writ of Certiorari to the
United States Court of Appeals,
Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and
Associate Justices of the Supreme Court
of the United States:

Petitioner, George Hamm, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this matter on November 4, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, entered on November 4, 1985, is reported at 774 F.2d 1567, and is reprinted in the Appendix to this petition. (App. A) The judgments of the United States District Court for the Northern District of Georgia, entered January 5, 1984, and July 31, 1984, in slip opinion, Civil Action No. C81-1415A, are also reprinted in the

Appendix. (App. B and App. C) The judgments of the United States District Court are not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on November 4, 1985. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the due process clause of the fourteenth amendment, and the eighth amendment's prohibition against cruel and unusual punishment in addition to the following statutes and rules, each of which, in pertinent part, is set forth below:

U.S. Const. amend. XIV

...[N]or shall any State deprive any person of life, liberty, or property, without due process of law;...

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 42, United States Code, Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 28, United States Code, Section 1254(1)

Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of the judgment or decree;

United States Supreme Court Rule 17.1.(a),(c)

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted

and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

GEORGE HAMM, appellant below, was an inmate in the DeKalb County, Georgia, jail on four separate occasions between 1979 and 1982. He filed his civil rights complaint pro se in forma pauperis pursuant to 42 U.S.C. § 1983. Currently a state prisoner incarcerated at Coastal Correctional Institute, Garden City, Georgia, the petitioner alleged in his complaint that his civil rights were

violated while he was incarcerated at the DeKalb County jail. During his detention, the jail population significantly exceeded the design capacity of the jail, requiring Mr. Hamm to sleep on the floor or on tables for approximately two months. Food was served on unclean dishes with unsanitary utensils. The food frequently contained foreign matter such as roaches, fruit flies, ashes, hair and rocks.

Prior to his incarceration, Mr. Hamm was being treated for various health problems including diagnosed schizophrenia. Although the DeKalb County jail officials were aware of his mental condition, Mr. Hamm was, nevertheless, confined with the general inmate population. On numer-

ous occasions, Mr. Hamm signed the sick call list to see a physician concerning his health problems. Mr. Hamm was usually sent unidentified medication by the duty nurse with no evaluation by a physician. Often, such medication consisted of aspirin or aspirin compounds even though Mr. Hamm had advised prison officials that he was allergic to aspirin. During the course of incarceration, Mr. Hamm was afflicted with a rash which has not been cured. He ultimately suffered a mental breakdown for which he was transferred and treated.

DeKalb County, Georgia, originally named as the sole defendant in this civil rights action, was served with the summons and complaint on December 8, 1981, and filed its responsive

pleadings on December 30, 1981.

On March 4, 1982, the petitioner moved the court for relief to amend his complaint to add Pat Jarvis, Sheriff of DeKalb County, as a defendant. The motion was granted on April 14, 1982, and the complaint was so amended on that date. Petitioner then improperly served Sheriff Jarvis with the amended complaint and a set of interrogatories. Because of the defective service, Sheriff Jarvis and his attorney did not respond. At this point, petitioner realized that he did not have the requisite knowledge of the Federal Rules of Civil Procedure to prosecute a case such as this, and requested that the court appoint counsel to assist him. The district court signed an order appointing the firm of

Hurt, Richardson, Garner, Todd & Cadenhead as counsel for Mr. Hamm on August 31, 1982. After counsel reviewed the file and realized that Sheriff Jarvis had not been properly served, a copy of the complete file was made and delivered to the U. S. Marshal's office together with a proper summons for service on Sheriff Jarvis. The U. S. Marshal's notice of service shows that Sheriff Jarvis was served on October 25, 1982.

Sheriff Jarvis failed to file responsive pleadings to the complaint served upon him by the U.S. Marshal on October 25, 1982; therefore, the petitioner moved for a default judgment against Sheriff Jarvis on April 4, 1983.

The motion for default judgment

was denied, and Sheriff Jarvis' motion for relief to file defensive pleadings was granted. Sheriff Jarvis was then given fifteen days from June 8, 1983, the date of the order, to respond to the complaint. When Sheriff Jarvis failed, however, to so respond, petitioner filed a second motion for default judgment against Sheriff Jarvis. This time, Sheriff Jarvis showed that his counsel had overlooked the court's order of June 8, 1983, requiring Sheriff Jarvis to file responsive pleadings within fifteen days. The court denied the petitioner's motion for a default judgment on September 15, 1983, ordering that the answer and response filed by Sheriff Jarvis on April 23, 1983, as an exhibit to his motion for leave to file

responsive pleadings was sufficient compliance with the court's order of June 8, 1983.

On January 5, 1984, the court granted the County's motion for summary judgment with respect to Mr. Hamm's allegations of inadequate medical care, treating the medical care claims wholly apart from Mr. Hamm's other claims. (App. B) The remaining portions of the County's motion for summary judgment were denied. The court ultimately entered an order in favor of Sheriff Jarvis as to the medical care issues on July 3, 1984, after all evidence had been presented at trial without a jury. The trial took place in the United States District Court for the Northern District of Georgia, Atlanta Division, on July

2-3, 1984. Both the County and Sheriff Jarvis received final judgment in their favor on the remaining issues on July 31, 1984. (App. C)

On August 28, 1984, petitioner filed his notice of appeal with respect to the final order entered in this action on July 31, 1984, as well as the court's denial of two motions for default judgment against Sheriff Jarvis on June 8, 1983, and September 15, 1983, its grant of summary judgment on the medical care issues to DeKalb County on January 5, 1984, and the entry of final judgment on the medical care issues for Sheriff Jarvis on July 3, 1984.

The United States Court of Appeals for the Eleventh Circuit affirmed the trial court's judgments in its opinion

rendered November 4, 1985. (App. A)

A Petition for Writ of Certiorari was timely filed in this Court.

REASONS FOR GRANTING WRIT

I. CERTIORARI SHOULD BE GRANTED FOR THE UNITED STATES SUPREME COURT TO ARTICULATE APPROPRIATE STANDARDS APPLICABLE TO CONDITIONS OF DETENTION OF PRETRIAL DETAINEES AND CONVICTED PRISONERS.

The Court of Appeals for the Eleventh Circuit noted in dicta in its opinion in this case that "there must be a minimum standard for providing detainees with basic necessities, the failure to meet which amounts to a violation of due process." Hamm v. DeKalb County, 774 F.2d 432, 1567,

1573 (11th Cir. 1985). Basic necessities include food, living space and medical care. In the same discussion, the court notes that states may not subject pretrial detainees to conditions of confinement that would violate a convicted prisoner's eighth amendment rights. Id. at 440; See City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983); Aldridge v. Montgomery, 753 F.2d 970, 972 (11th Cir. 1985).

This Court in City of Revere v. Massachusetts General Hospital, supra, discussed the obligation of a governmental entity pursuant to the due process clause of the fourteenth amendment to provide medical care to persons injured while being apprehended by the police.

> [T]he due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner.

463 U.S. 239, 244, 103 S.Ct. 2979, 2983, 77 L.Ed.2d 605, 611. Without articulating a standard or setting precise limits to a governmental agency's responsibility to provide medical care, the Court relied on the test set forth in Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) as dispositive of the constitutional obligation imposed by the eighth amendment. Thus, to state a claim under 42 U.S.C. § 1983, with regard to medical care alone, a convicted prisoner must show deliberate indifference to serious medical needs.

Although the Eleventh Circuit Court of Appeals acknowledges that

this Court has not set forth a standard for determining the level of necessities required by the due process clause, the court holds that in providing pretrial detainees with such necessities as food, living space and medical care, the due process requirements for pretrial detainees and eighth amendment requirements for convicted prisoners are functionally equivalent since the two provisions yield the same result. Hamm, at 1573-1574. The Eleventh Circuit's reasoning is confusing since it relies on Bell v. Wolfish, 441 U.S. 520, 575, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), prohibiting any punishment of pretrial detainees prior to lawful conviction of a crime, and Aldridge, 753 F.2d at 972, which relies on Bell and recog-

nizes "that problems relating to inadequate medical care may require different standards of care between pretrial detainees...and convicted prisoners...." Equating due process and eighth amendment standards does not yield different standards, but one standard applicable to both pretrial detainees and convicted prisoners. Surely, pretrial detainees who are presumptively innocent are entitled to a more favorable standard concerning basic necessities than convicted prisoners who have transgressed society's laws and paid with their freedom. Goodson v. City of Atlanta, 763 F.2d 1381, 1386 (11th Cir. 1985); Campbell v. McGruder, 580 F.2d 521, 527 (D.C. Cir. 1978); Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978). This Court

has not yet spoken to the standards for basic necessities for pretrial detainees. This case, unlike City of Revere which focused on medical care, presents the critical issue for review by this Court of what standards apply to a breakdown in providing all basic necessities -- food, living space and medical care.

A. Pretrial Detainees Should Not Be Subjected To The Eighth Amendment Standards Applicable To Convicted Prisoners.

The opinion of the Eleventh Circuit below conflicts with opinions within the circuit by equating standards for basic necessities applicable to pretrial detainees with those applicable to convicted prisoners. The court's decision in Hamm is at odds with opinions rendered by other panels

of the Eleventh Circuit in Goodson and Aldridge. These decisions appear to classify pretrial detainees and prisoners separately and to evaluate provision of basic necessities by more rigorous criteria favoring pretrial status. It is, thus, inaccurate for the Hamm court to find consistency in the opinions and fundamentally inaccurate to equate pretrial detainees and prisoners for purposes of provision of basic necessities by the State.

This Court has held that a convicted prisoner has an eighth amendment right to be free from cruel and unusual punishment as manifested by deliberate indifference to serious medical needs. Estelle, 429 U.S. at 106. A pretrial detainee has a fourteenth amendment, due process right to

be free of punishment altogether. Bell, 441 U.S. at 575. Clearly, a convicted prisoner may be subjected to punishment which is not cruel and unusual while a presumptively innocent pretrial detainee may only be detained, not punished. To reference the conditions of confinement for pretrial detainees to those of convicted inmates under the eighth amendment is false logic. By equating conditions for pretrial detainees and convicted prisoners, the Hamm court impermissibly subjects pretrial detainees to the same standard applicable to convicted prisoners and supports this position by advancing a state's legitimate interest in limiting the cost of detention. Hamm, at 1573.

By relieving the State of a duty

to differentiate between treatment of pretrial detainees and convicted prisoners, those suspects detained to ensure presence at trial run the risk of being subjected to punishment regardless of innocence or guilt. See Goodson, 763 F.2d at 1384-86. To guard against such deprivations of constitutional rights, a separate standard should be articulated by this Court describing the State's responsibility for providing basic necessities to pretrial detainees. This case presents the opportunity to articulate such a standard.

B. This Court Should Address the Conflict Between Hamm and the Fifth Circuit on Whether Conditions Of Prison Confinement Must Be Viewed In Their Totality To Assess Whether A Pretrial Detainee Or Convicted Prisoner Has Been Subjected To A Depriva-

tion Of Constitutional Rights.

The Eleventh Circuit Court of Appeals held that the eighth amendment deliberately indifferent standard is applicable in assessing the constitutional adequacy of medical care and that states must furnish reasonably adequate diet and living space. The court then proceeded to evaluate each claim separately under its applicable standard, while holding that the district court's failure to consider the claims together was not prejudicial error. Inasmuch as neither the district court nor the Court of Appeals for the Eleventh Circuit has addressed the totality of conditions, the court's holding that the failure to do so was not prejudicial is baseless. The court's holding also conflicts

with holdings of the Fifth Circuit Court of Appeals. Ruiz v. Estelle, 679 F.2d 1115, 1139-40 (5th Cir. 1982) cert denied, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983). Jones v. Diamond, 636 F.2d 1364, 1374 (5th Cir. 1981).

Parceling judgments becomes more than just a procedural expedient but removes from consideration factors which in combination create the environment of a prisoner's existence. The Fifth Circuit therefore has held that it is the combined impact of the conditions to which Mr. Hamm was subjected that constituted a constitutional deprivation. It was inappropriate for both the district court and the Eleventh Circuit to consider separately the conditions which to-

gether create a situation each alone would be incapable of producing. This is especially true in light of the testimony of Dr. Baccus, Commissioner of Mental Health and Mental Retardation for Fulton County. See Transcript at 16-21 (hereinafter "T.-__"). Given George Hamm's diagnosis of schizophrenia chronic undifferentiated type [T.-19, lines 19-21; T.-20, lines 12-15], Dr. Baccus felt that the conditions to which Hamm was subjected would cause more stress which could exacerbate his existing mental condition. [T.-19, lines 6-18; T.-20, lines 20-24] The overcrowded conditions, unsanitary food service, and inadequate medical care stood in synergistic combination, not only with each other, but also with Mr. Hamm's

existing mental condition. Accordingly, this Court should review this conflict in the circuits and remand this case in order for the court to apply the appropriate standard to the totality of conditions and not to each condition separately.

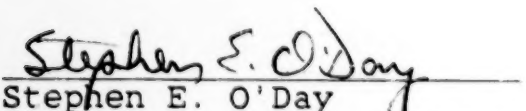
CONCLUSION

In summary, petitioner respectfully requests that his Petition for Writ Certiorari should be granted so that the court may (1) articulate the proper standard applicable to pretrial detainees and convicted prisoners; and (2) resolve the conflict between the circuits as to whether the conditions of prison confinement must be viewed in their totality or separately to de-

termine the existence of a deprivation of constitutional rights. For the reasons stated above, Petitioner respectfully requests that a Writ of Certiorari be issued and the decision of the United States Court of Appeals for the Eleventh Circuit with instructions that judgment be entered in favor of petitioner.

Respectfully submitted,

HURT, RICHARDSON, GARNER, TODD & CADENHEAD



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APPENDIX

APPENDIX A

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY and HILL, Circuit Judges, and PITTMAN*, District Judge.

PITTMAN, District Judge:

The plaintiff-appellant George Hamm (Hamm) brought this action against defendants-appellees DeKalb County (County) and Pat Jarvis, Sheriff of DeKalb County (Sheriff), seeking damages for the allegedly unconstitutional conditions existing at the DeKalb County Jail during his incarceration there. He alleged that the jail was overcrowded, that

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* Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

the conditions were unsanitary, that the food service was unsanitary, and that the medical care was inadequate. A partial summary judgment was granted to the County. There followed a nonjury trial on the remaining issues. The district court found no constitutional deprivation and entered judgment in favor of both defendants. On appeal, Hamm contends that the district court applied incorrect rules of law to the merits of his claims, that its finding that he suffered no actual injury was clearly erroneous, that it erred in granting a partial summary judgment in favor of the County, and that it should have entered a default judgment against the Sheriff. Because this court finds no prejudi-

cial error in the district court's decisions, we affirm the judgment of the district court.

I. FACTUAL BACKGROUND

Hamm was incarcerated in the DeKalb County Jail for various periods during 1979 through 1982. The parties agree that the periods of incarceration pertinent to this appeal are February 11, 1980 to April 14, 1980 and September 23, 1980 to May 20, 1981. These periods of incarceration include periods both before and after Hamm's conviction.

The County provides funding for the jail and is involved in establishing the general policies, practices, and procedures under which the jail operates. The jail is su-

pervised by the Sheriff and the DeKalb County Board of Commissioners. They set the general policies, practices, and procedures which were responsible for the conditions present at the jail during Hamm's incarceration, excepting Hamm's claims as to medical treatment.

During Hamm's incarceration there, the jail's population at times exceeded the facility's design capacity. As a result of the overpopulation, at times Hamm slept on an eating table or on a mattress placed on the floor. Often the floor and the linens provided were unsanitary.

The district court found that the food occasionally contained foreign objects and that the jail often

failed to meet Georgia Department of Human Resources Food Preparation Standards. It nonetheless found that the jail met the inmates' nutritional needs by serving three meals a day, consisting of a total of 2,600 calories. It also found that the food service did not cause Hamm to become seriously ill.

Hamm also alleged that he received inadequate medical care while at the jail. He testified that although he signed the sick call list on numerous occasions in an effort to see a physician concerning various health problems, he never saw a doctor other than a psychiatrist. Other evidence indicates that he saw a doctor on at least one occasion. After signing the sick call list,

Hamm ordinarily either saw a nurse or was sent unidentified medication by the nurse. He often received aspirin or medication containing aspirin even though he claims he had advised jail officials that he was allergic to aspirin. Hamm also testified that he became afflicted with a rash while incarcerated at the jail and that he was unable to obtain appropriate medical treatment of the rash.

Hamm claims he suffered from schizophrenia prior to his incarceration, and he continued to experience schizophrenia while in the County jail. He testified that before his incarceration he saw a psychiatrist once or twice a year, took thorazine and mellaril as prescribed

by the psychiatrist, and attended group therapy. He testified that he saw a psychiatrist about nine days after entering the County jail and about every four months after that. The record shows that the County provided for a psychiatrist to visit the jail once a week to interview patients and potential patients as he deemed necessary. This visiting psychiatrist continued prescribed medications similar to that Hamm had taken prior to his incarceration. Hamm alleged that the conditions at the County jail aggravated his mental problems and caused him to suffer a mental breakdown.

II. PROCEDURAL HISTORY

Hamm filed this action against

the County alleging that his constitutional rights had been violated as a result of the totality of the conditions at the County jail, including the overcrowding, the unsanitary manner in which the food was served, and the inadequacy of the medical care he received. He filed the suit pro se and in forma pauperis and sought damages under 42 U.S.C. § 1983. Hamm subsequently sought leave to amend his complaint to add Sheriff Jarvis as a defendant. His motion was granted, and the complaint was amended. After he failed properly to serve the complaint on the Sheriff, Hamm requested and received court appointed counsel. On October 25, 1982, Hamm's counsel served the Sheriff with several documents.

After the Sheriff failed to file responsive pleadings, Hamm on April 4, 1983 filed a motion for default judgment against the Sheriff. The Sheriff on April 21, 1983 responded to the motion, noting that he had not been served with a complaint. He also filed on that date a motion for leave to file defensive pleadings, attaching his answer and response to that motion. In an order dated June 8, 1983, the district court denied Hamm's motion for default judgment, granted the Sheriff's motion to file defensive pleadings, and gave the Sheriff fifteen days in which to respond to the complaint. The Sheriff did not file an additional response in order to comply with the court's order, and

Hamm on September 9, 1983 filed a second motion for default judgment. The Sheriff filed a response to the motion noting that responsive pleadings had been attached to the motions he filed April 21, 1983. The district court denied the motion for default judgment and held that the pleadings filed April 21, 1983 constituted compliance with the court's order of June 8, 1983.

The district court then granted summary judgment in favor of the County on Hamm's medical care claims. In a lengthy discussion of the medical care Hamm received at the jail, the court implied that any deficiency in Hamm's medical treatment did not rise to constitutional proportions. Nonetheless, the court

rested its grant of summary judgment on this issue on the absence of an official policy or custom through which the county might be liable for Hamm's grievances. See Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1977). The court denied the County's motion for summary judgment as it pertained to the issues of overcrowding and the adequacy of the jail's food service.

The case then went to trial with the claim of inadequate medical care pending against the Sheriff alone and the claims of overcrowding and inadequate food service pending against both the Sheriff and the County. Following a nonjury trial, the district court found from the

bench and without written findings that Hamm failed to show by a preponderance of the evidence that the Sheriff was deliberately indifferent to Hamm's serious medical needs. The court subsequently entered written findings and conclusions on the other claims. It found that the jail population did exceed the jail's design capacity and that the jail's food service practices were somewhat deficient. The court found, however, that Hamm did not suffer any injury or illness as a result of these conditions. The court specifically found that the conditions at the jail "did not seriously aggravate the physical and mental problems [Hamm] suffered before being incarcerated." Hamm v.

DeKalb County, Civil Action No. C81-1415A, slip op. at 3 (N.D.Ga. July 31, 1984). The court thus concluded that Hamm was not deprived of any constitutional rights and thus was not entitled to an award of damages under § 1983. Hamm appealed.

III. ISSUES ON APPEAL

Hamm actually raises five issues on appeal, three of which concern the district court's ruling on the merits of the claims that were tried. First, he contends that the district court erred by failing to consider in combination the jail's overcrowding, its unsanitary food service, and its inadequate medical care to determine whether the totality of the conditions amounted to a

constitutional deprivation. Second, he contends that the court erred in holding that proof of actual injury is a prerequisite to recovery under § 1983. Third, even if proof of actual injury is required, Hamm argues, actual injury was shown, and the district court's finding to the contrary was clearly erroneous. The fourth issue raised by Hamm is whether the district court erred in granting summary judgment in favor of the County on his medical care claims. Last, he contends that the district court abused its discretion when it denied his motions for default judgment against the Sheriff.

A. Conditions of Confinement

1. What Standard Applies?

[1,2] In order to assess Hamm's

contention that the district court erred in its evaluation of the conditions imposed on him at the County jail, this court must determine the proper constitutional standards to apply to those conditions. Although the Constitution does not and the court cannot dictate the general conditions that should exist in jails and prisons, the Constitution does require conditions of confinement imposed by states to meet certain minimum standards. Jones v. Diamond, 636 F.2d 1364, 1368 (5th Cir.) (en banc), cert. granted, 452 U.S. 959, 101 S.Ct. 3106, 69 L.Ed.2d 970, cert. dismissed, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981). The eighth and fourteenth amendments set limits on the treat-

ment and conditions that states may impose on prisoners. Therefore, while a court must not substitute its views for those of legislators and jail administrators and it must limit its inquiry to the issue of whether conditions of confinement violate a prohibition of the Constitution, Bell v. Wolfish, 441 U.S. 520, 562, 99 S.Ct. 1861, 1886, 60 L.Ed.2d 447 (1979), "it is [the court's] duty, when jurisdiction is properly invoked, to protect prisoners' rights." Jones, 636 F.2d at 1368.

[3] The eighth amendment, which applies to the states through the fourteenth amendment, Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed. 2d 758 (1962), prohi-

bits the infliction of cruel and unusual punishment. Under that provision, states may not impose punishments that shock the conscience, involve unnecessary and wanton infliction of pain, offend evolving notions of decency, or are grossly disproportionate to the offense for which they are imposed. Newman v. Alabama, 503 F.2d 1320, 1330 n. 14 (5th Cir. 1974), cert. denied, 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102 (1975). See Estelle v. Gamble, 429 U.S. 97, 102-03, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976); Gregg v. Georgia, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976) (plurality opinion); Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958). Under this

provision, the Supreme Court has stated, "conditions of confinement ... may make intolerable an otherwise constitutional term of imprisonment." Ingraham v. Wright, 430 U.S. 651, 669 n. 38, 97 S.Ct. 1401, 1411 n. 38, 51 L.Ed.2d 711 (1977) (quoting Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir.), cert. denied, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973)). Various conditions, "alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual under the contemporary standard of decency." Rhodes v. Chapman, 452 U.S. 337, 347, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981). On that basis, courts hold

that states violate the eighth amendment if they are deliberately indifferent to a prisoner's serious medical needs, Estelle, 429 U.S. at 106, 97 S.Ct. at 292, or if they fail to provide prisoners with reasonably adequate food, clothing, shelter, and sanitation. Newman v. Alabama, 559 F.2d 283, 286 (5th Cir. 1977); rev'd in part on other grounds sub nom Alabama v. Pugh, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978); Gates v. Collier, 501 F.2d 1291, 1301 (5th Cir. 1974).

Part of Hamm's claim arises under the eighth amendment. The district court's finding that Hamm's incarceration at the jail ended on February 8, 1981--the date of his conviction--is clearly erroneous.

The parties agree that Hamm was in the jail at least until May 20, 1981; and jail records discussed at trial indicated that he was in the jail intermittently at least through December, 1981 and perhaps February, 1982. It is clear, therefore, that the conditions about which Hamm complains were imposed on him both before and after his conviction. The district court correctly applied the appropriate eighth amendment standards to the period following Hamm's conviction and its conclusions were not clearly erroneous.

[4] The eighth amendment, however, applies only to confinement that occurs subsequent to and as a consequence of a person's lawful conviction of a crime. "[T]he State

does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." Ingraham, 430 U.S. at 671-72 n. 40, 97 S.Ct. at 1412-13 n. 40. Conditions of confinement imposed prior to conviction are limited instead by the due process clause of the fourteenth amendment. Bell, 441 U.S. at 520 & n. 16, 99 S.Ct. at 1861 & n. 16. Since the conditions about which Hamm complains in this case were imposed on him both before and after his conviction, this court must evaluate them under both the eighth amendment and the due process clause. Moreover, since the district court applied eighth amendment

standards, this court must determine the extent to which those standards differ--if any--from due process standards.

[5] For the period of time Hamm was incarcerated as a pretrial detainee the claims will be considered under the due process clause since states may not punish pretrial detainees at all prior to their lawful conviction of a crime. Bell, 441 U.S. at 575 & n. 16, 99 S.Ct. at 1892 & n. 16. The former Fifth Circuit, sitting en banc, has stated:

> The due process clause accords pretrial detainees rights not enjoyed by convicted inmates. While a sentenced inmate may be punished in any fashion not cruel and unusual, the due process clause forbids punishment of a person awaiting trial but not yet adjudged guilty of any crime.

Jones, 636 F.2d at 1368. The Supreme Court in Bell v. Wolfish articulated the standard for determining when constraints and conditions of confinement constitute punishment thus prohibiting their imposition on pretrial detainees. The Court noted initially that the government, following an appropriate determination of probable cause, see Gerstein v. Pugh, 420 U.S. 103, 111-14, 95 S.Ct. 854, 861-63, 43 L.Ed.2d 54 (1985), may detain a suspect to ensure his presence at trial. Bell, 441 U.S. at 533-34, 537, 99 S.Ct. at 1870-71, 1873. Such detention, the Court continued, necessarily imposes restraints and disabilities on the detainees, and "[n]ot every disability ... amounts to 'punishment' in the constitutional sense." Id. at

537, 99 S.Ct. at 1873. In the absence of "an express intent to punish on the part of detention facility officials," the Court stated,

> if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal--if it is arbitrary or purposeless--a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.

Bell, 441 U.S. at 539, 99 S.Ct. at 1874. The Court stressed that the government's interest in ensuring a detainee's presence at trial is not "the only objective that may justify restraints and conditions once the decision is lawfully made to confine a

person." Id. at 540, 99 S.Ct. at 1874 (emphasis in original). Legitimate restraints may stem from the state's need to manage the detention facility and maintain security. Id.

[6,7] Courts have not had occasion to explore extensively the application of the Bell v. Wolfish standard or its relation to the eighth amendment standards, particularly as it pertains to a jail's provision of basic necessities such as food, living space, and medical care. Application of the Bell v. Wolfish standard to those areas is exceedingly difficult and does not provide clear results. Clearly, states forever can improve the quality and quantity of the food, living space, and medical treatment that they provide those incarcerated

merely by increasing and properly administering the amount of money they spend on a detention facility. Thus, a state's decision to maintain at a reasonable level the quality of food, living space, and medical care rather than improve or increase its provisions of those necessities serves a legitimate purpose: to reasonably limit the cost of detention. It is equally clear that the due process clause does not purport to regulate the general conditions and quality of life in the country's jails, and that the courts should not attempt to make "judgment calls" to determine which of various marginally different conditions might be more appropriate. See Bell, 441 U.S. at 562, 99 S.Ct. at 1886; Jones, 636 F.2d at 1368 (courts

"should not, 'in the name of the Constitution, become ... enmeshed in the minutiae of prison operations.'") Therefore, a state's interest in reasonably limiting the cost of a detention facility is a legitimate governmental objective in the framework of the Bell v. Wolfish standard; and, consequently, courts in most instances may not interfere with a state's decision to provide detainees with a reasonable level and quality of food, living space, and medical care.

[8] Nonetheless, there must be a minimum standard for providing detainees with basic necessities, the failure to meet which amounts to a violation of due process. A state's failure to provide any food to incarcerated detainees, for example, clearly

would violate the due process protection of a pretrial detainee regardless of the state's objective. Therefore, certain legitimate state objectives may justify the imposition of certain conditions only if those conditions are not too severe. The state's interest in limiting the cost of detention, for example, ordinarily will justify the state's decision to provide detainees with a reasonable level of food, living space, and medical care. Yet that same objective will justify neither the complete denial of those necessities nor the provision of those necessities below some minimally adequate level. Due process must require states to provide pretrial detainees with some minimal level of those necessities, and the failure to pro-

vide that level of necessities violates due process--even though the conditions imposed serve some ordinarily legitimate state objective. Certainly states may not impose on pretrial detainees conditions that would violate a convicted prisoner's eighth amendment rights. See City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244, 103 S.Ct. 2979, 2983, 77 L.Ed.2d 605 (1983) ("the due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner."), quoted in Aldridge v. Montgomery, 753 F.2d 970, 972 (11th Cir. 1985). The Supreme Court, however, has not set forth a standard for determining what level of necessities the due process clause ab-

solutely requires.

[9, 10] This court holds that in regard to providing pretrial detainees with such basic necessities as food, living space, and medical care the minimum standard allowed by the due process clause is the same as that allowed by the eighth amendment for convicted persons. The court recognizes that the limitations imposed by the eighth amendment and the due process clause arise in different contexts. Nonetheless, with respect to the provision of basic, necessities to individuals in the state's custody, the two provisions necessarily yield the same result. Cf. Jones, 636 F.2d at 1378 (relies on standards articulated in eighth amendment litigation to determine the right of pretrial detainees to an adequate diet). Distin-

guishing the eighth amendment and due process standards in this area would require courts to evaluate the details of slight differences in conditions. Many city and county jails have convicted prisoners and pretrial detainees. That approach would result in the courts' becoming "enmeshed in the minutiae of prison operations," a situation against which the Supreme Court has warned. Therefore, the level at which states provide pretrial detainees with basic necessities--in addition to being "reasonably related to a legitimate governmental objective"--must meet the standards applied under the eighth amendment prohibition on cruel and unusual punishment, i.e., they must furnish the detainees with a reasonably adequate diet, and living

space, and with reference to medical needs, they must not be deliberately indifferent to detainees' serious medical needs. Life and health are just as precious to convicted persons as to pretrial detainees. The standard in regard to medical care in determining a violation of the eighth amendment is deliberately indifferent. The standard to measure the state's duty under the due process clause for pretrial detainees for medical care can equally and fairly be measured by the same standard.

In Goodson v. City of Atlanta, 763 F.2d 1381 (11th Cir. 1985), a panel of this court affirmed a judgment based on a jury verdict in favor of a pretrial detainee. The court observed that the evidence was sufficient to

support a determination that plaintiff "was denied his rights to due process of law in violation of the Fourteenth Amendment and subjected to cruel and unusual punishment as is prohibited by the Eighth Amendment. Id. at 1386 (emphasis added). The court went on to discuss pretrial detainees and convicted inmates as distinct groups. We do not view the quoted language of Goodson as holding that pretrial detainees' rights are established by the eighth amendment. We see the Goodson decision as consistent with our holding today that, with respect to basic necessities of life, the fourteenth amendment rights of detainees can be defined by reference to the eighth amendment rights of convicted inmates.

2. Applying the Standards to this Case.

Hamm does not contest the district court's factual findings concerning the overcrowded conditions and the quality of the food service at the County jail. He contends, however, that the district court erred in holding that these conditions did not amount to constitutional deprivations. Even if the various conditions standing alone do not amount to constitutional deprivations, Hamm argues, the overcrowding, inadequate food service, and the inadequate medical care combined to make the totality of the conditions unconstitutional. This court disagrees.

[11, 12] To recover on his claim

of inadequate medical care, Hamm had to prove that jail officials engaged in "acts or omissions sufficiently harmful to evidence deliberate indifference to [his] serious medical needs." Estelle, 429 U.S. at 106, 97 S.Ct. at 292. Accord, Aldridge, 753 F.2d at 972. Essentially, Hamm claims that medication was prescribed for him without proper examination, authorization, and review by a physician. He also claims that he was not treated for a rash on his foot. The evidence supporting these claims, however, was sparse. Hamm presented no expert or other evidence that the supervision and authorization under which he was prescribed medication failed to meet appropriate professional standards. The only evidence concerning the rash

was Hamm's own testimony. The Sheriff, on the other hand, presented medical records which showed that Hamm made numerous visits to the jail's infirmary where he was usually treated by the registered nurse on duty there. The records indicate that a physician occasionally examined Hamm as well. The jail's medical staff entertained a wide variety of complaints from Hamm and prescribed several types of medication for him. The record also shows that a psychiatrist examined Hamm at the jail and prescribed medication for him. This evidence shows that Hamm received significant medical care while at the jail. Although Hamm may have desired different modes of treatment, the care the jail provided did not amount to deliberate

indifference. See Bass v. Sullivan, 550 F.2d 229, 231-32 (5th Cir.), cert. denied, 434 U.S. 864, 98 S.Ct. 195, 54 L.Ed.2d 138 (1977); accord, Westlake v. Lucas, 537 F.2d 857, 860 n. 5 (1st Cir 1981) ("Where a prisoner has received . . . medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims that sound in tort law."). The only medical problem alleged to have gone untreated was Hamm's rash, and the district court had ample factual grounds on which to find that Hamm failed to prove on this allegation deliberate indifference to his serious medical needs. The district court was not clearly erroneous in holding that

Hamm did not meet his burden of proof on this issue.

[13] The district court was not clearly erroneous in holding that the food served at the jail met constitutional requirements. The Constitution requires that prisoners be provided "reasonably adequate food." Jones, 636 F.2d at 1378; Newman, 559 F.2d at 286. "A well-balanced meal, containing sufficient nutritional value to preserve health, is all that is required." Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977). The fact that the food occasionally contains foreign objects or sometimes is served cold, while unpleasant, does not amount to a constitutional deprivation. Hoitt v. Vitek, 497 F.2d 598, 601 (1st Cir. 1974); Sinclair v. Hen-

derson, 331 F.Supp. 1123, 1126 (D.La. 1971), quoted in Freeman v. Trudell, 4978 F.Supp. 481, 482 (E.D. Mich. 1980). The district court applied the appropriate standards on this issue.

[14, 15] The district court likewise applied the correct standards to Hamm's claims concerning sleeping arrangements and overcrowding at the jail. The fact that Hamm temporarily had to sleep upon a mattress on the floor or on a table is not necessarily a constitutional violation. See Crowe v. Leeke, 540 F.2d 740-41 (4th Cir. 1976); cf. Bell, 441 U.S. at 541-43, 99 S.Ct. 1875-76 (upholds the practice of "double-bunking"). In assessing claims of unconstitutionally overcrowded jails, courts must consider the impact of the alleged overpopula-

tion on the jail's ability to provide such necessities as food, medical care, and sanitation. See Rhodes, 452 U.S. at 347-48, 101 S.Ct. at 2399-2400. There was no evidence that the conditions were imposed arbitrarily. The district court was not clearly erroneous in finding these conditions did not rise to constitutional violations.

[16] Neither was the totality of conditions unconstitutional. Although the district court did not expressly address Hamm's medical care claims in combination with his other claims, it is clear from the district court's findings on the individual claims that the conditions--in combination--did not fall below constitutional standards. The district court should have

expressly considered the claims together, cf. Ruiz v. Estelle, 679 F.2d 1115, 1139-40 (5th Cir. 1982), cert. denied, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983) (espousing a "totality of conditions" test). Its failure to do so was not prejudicial error. The district court was not clearly erroneous in holding the several individual conditions and implying the totality of the conditions under which Hamm was confined were constitutional.

B. Proof of Actual Injury

Since this court holds that the conditions of Hamm's confinement were not unconstitutional, it need not address his contention that the district court erroneously made proof of actual injury a prerequisite to recovery under § 1983.

C. The County's Summary Judgment On the Medical Care Claims

The district court did not commit prejudicial error by entering summary judgment in favor of the County on Hamm's medical care claims. Hamm presented no supported allegation to link his claims to any official policy or custom. Although jail officials could allow a facility to become so overcrowded that proper medical care could no longer be provided, Hamm did not support such an allegation in this case. His complaints concerned specific flaws in the treatment afforded him, and they were not attributable to official policy or custom.

Even if the summary judgment was erroneous, it was not prejudicial. Hamm made the same medical care claims against the Sheriff and litigated them

fully. The claims were in such a posture that the County could not have been liable without the Sheriff being liable as well. The district court found the medical care afforded Hamm met constitutional requirements and this court has held it was not clearly erroneous in these findings. The court also has stated that under the district court's finding no constitutional violation occurred.

D. Hamm's Motions for Default Judgment

[17, 18] The entry of a default judgment is committed to the discretion of the district court, see Mason v. Lister, 562 F.2d 343, 345 (5th Cir. 1977); C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure: Civil 2d § 2685 (1983); and the district court did not abuse its discre-

tion in denying Hamm's motions for a default judgment against the Sheriff in this case. Although Hamm's attorneys served the Sheriff with several documents on October 25, 1982, the parties disagreed whether a complaint was included. The district court found that there was "convincing evidence" that the complaint was not served at that time and that it still had not been served when Hamm first moved for a default judgment. Since the district court found that Hamm had not been prejudiced, its denial of Hamm's first motion for a default judgment was well within its discretion. The denial of Hamm's second motion for a default judgment likewise was appropriate. As the district court found, the Sheriff's answer and response ac-

tually were filed prior to the motion for default and within the time set by the court.

IV. CONCLUSION

Since this court finds no prejudicial error in the district court's decision and since the conditions of Hamm's confinement at the DeKalb County Jail were not unconstitutional, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGE HAMM,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
vs.	)	
	)	NO. C81-1415A
DEKALB COUNTY and	)	
PAT JARVIS, Sheriff,	)	
	)	
Defendants.		

ORDER

I. INTRODUCTION

The above-styled complaint is a civil rights action filed pursuant to 42 U.S.C. § 1983 (1976). The gravamen of the complaint concerns the plaintiff's objection on constitutional grounds to certain alleged conditions and practices in existence during his terms of past con-

finement at the DeKalb County jail in Decatur, Georgia. The matter is before the court at this time for a ruling upon the defendant DeKalb County's (hereinafter "county") motion for summary judgment and the plaintiff's motion for access to counsel.

II. BACKGROUND OF THE CASE

On July 27, 1981, the plaintiff, proceeding pro se, filed a complaint with this court following his admission into the penal system of the state of Georgia. The allegations in his complaint dispute the constitutionality of the very fact of his present confinement as well as the conditions of his pre-trial incarceration in the custody of DeKalb

County authorities. For example, the plaintiff's verified original pleading states:

> Having been declared mentally incompetent by the state mental health authority, the plaintiff was adjudged unfit for trial in the year 1980 in DeKalb County court. Now, in the year 1981 the plaintiff finds himself incarcerated and being without memory or understanding of events leading to trial or of the trial and imposition of sentence, he wonders why?

In addition, an unverified addendum to the complaint contains the following allegations:

> Also doing [sic] my period of incarceration at the DeKalb County jail facilities I along with other people were subjected to overcrowded conditions. Where a cell was design for 26 men capacity, 56 men put in the cells, the floor was my bed for approximately 2 months. The food was served in a very unsanitary matter [sic]. Many people caught hipetitis [sic] be-

> cause of the unsanitary condition. The medical facilities were what a person may call nonchalance, unaffectionate toward mankind attitude.

In his prayer for relief, the plaintiff seeks compensatory and punitive damages as well as his release "for immediate evaluation and treatment in an appropriate health care facility." Complaint at 2-3.

Upon allowing the plaintiff to proceed in forma pauperis, the court su sponte engaged in a frivolity determination as provided under 28 U.S.C. § 1915(d) (1964). Insofar as the plaintiff's allegations questioned the fact of his conviction and subsequent confinement, the court construed the complaint as a petition for habeas corpus relief pursuant to 28 U.S.C. § 2254

(1976). As construed, the claim for habeas corpus relief was dismissed without prejudice for failure to exhaust available state remedies. Order of December 7, 1981. Subsequently, that portion of the complaint seeking release for mental evaluation and treatment was dismissed as moot. Order of January 25, 1982. The balance of the action was allowed to proceed as any other civil action.

Pursuant to the order dated December 7, 1981, the county filed an answer to the surviving parts of the plaintiff's complaint. The answer raises three separate defenses: (1) that the plaintiff's complaint fails to state a claim for relief; (2) that the plaintiff's

complaint is barred by the doctrine of sovereign immunity; and (3) that the county is entitled to a defense of qualified immunity. Answer, filed December 30, 1981. Thereafter, the county moved for leave to amend its answer to add the affirmative defense that the action is barred by a statute of limitations. Motion for Leave to Amend, filed February 10, 1982. Simultaneously, the county filed motions to dismiss based, respectively, upon the existence of a time-bar and for failure to state a claim upon which relief can be granted. Motions to Dismiss, filed February 10, 1982.

After consideration of these various motions, the court granted the county's motion to amend. Order

of March 19, 1982. However, the motion to dismiss on the ground of a time-bar was denied because the court disagreed with the county over the appropriate measurements of time necessary to the defense and over the applicable limitations statute. Id. at 2-3. In the same order, the court addressed the county's motion to dismiss. Relying upon Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 (1978), the county argued that the plaintiff had not sufficiently pled the requisite nexus between the deprivation complained of, the actions from which they arose, and an official policy or custom on the part of the county so as to invoke liability against that defendant under 42 U.S.C.

§ 1983. Brief in Support of Defendant's Motion for Leave to Amend and to Dismiss at 4. Reasoning that the very nature of the plaintiff's causes of action permit the inference of allegations that county policies or customs are the basis for the asserted deprivations, the court rejected the argument that the complaint failed to state a claim cognizable against the county. Order of March 19, 1982 at 3-4. Just prior to the filing of the motions under consideration, the court granted a motion by the plaintiff for leave to amend the complaint to add Pat Jarvis, Sheriff of DeKalb County, as an additional defendant. Order of April 14, 1982.

III. THE COUNTY'S MOTION FOR SUMMARY JUDGMENT

A. THE MOTION ITSELF

Following the denial of its motions to dismiss, the county moved for summary judgment pursuant to Federal Rule of Civil Procedure 56 claiming that there is no genuine issue as to any material fact and that the county is entitled to judgment as a matter of law. Motion for Summary Judgment, filed May 11, 1982. The county seeks judgment in its favor by advancing multiple arguments. First, the county has chosen to renew its contention that the plaintiff's claim is time-barred. Brief in Support of Defendant's Motion for Complete of [sic] Partial Summary Judgment at 2-8.

Second, the county similarly reasserts its position that the plaintiff's allegations fail to state a claim for relief under 42 U.S.C. § 1983. Id. at 8-9. Unlike the relevant motion to dismiss however, the county has submitted affidavits and medical records intended to pierce the mere allegations contained in the complaint. This accompanying material is intended to show that the plaintiff was provided with constitutionally adequate living space, food service and medical care during the periods of his confinement of the DeKalb County jail. Id. at 9-14; Affidavits of Major Wayne Melton & Dorris Payne, R.N.

B. THE PLAINTIFF'S RESPONSE

In reaction to the filing of the

county's motion for summary judgment, the plaintiff first submitted a cross-motion for summary judgment, filed May 20, 1982. After consideration of the plaintiff's motion and the county's response in opposition, filed May 21, 1982, the plaintiff's motion for summary judgment was denied. Order of May 26, 1982. The plaintiff then moved for the appointment of counsel pursuant to 28 U.S.C. § 1915(d). In granting the plaintiff's request, the court allowed the plaintiff's newly appointed counsel thirty days to respond to the county's motion for summary judgment. Order of August 31, 1982. Finally, after receiving several time extensions, the plaintiff filed his pleading in response

to that motion. Plaintiff's Brief in Response to Defendant DeKalb County's Motion for Summary Judgment, filed April 1, 1983.

In his responsive pleading, the plaintiff contends that there are genuine issues of material fact which remain for trial. In support of this contention, the plaintiff has submitted his own affidavit as well as those of other inmates who were confined at the DeKalb County jail during, or approximate to, the time periods in question. As a whole, the averments contained within these affidavits set forth facts intended to contravert the evidence provided by the county to the effect that the plaintiff was accorded constitutionally acceptable treatment

while in the custody of DeKalb County authorities.

C. Standard of Review

The initial burden of demonstrating that there is no genuine issue of fact and that one is entitled to judgment as a matter of law rests with the party requesting summary judgment. United States v. An Article of Food, 622 F.2d 768, 771 (5th Cir. 1980). When a motion for summary judgment is accompanied by affidavits or other acceptable evidence, it is encumbent upon the party opposing the motion to provide countervailing evidence which sets forth specific facts showing that there are genuine issues remaining for trial. Adickes v. S.H. Kress & Co., 398 U.S. 144, 153-61 (1970);

see generally Fed. R. Civ. P. 56(e). In other words, the adverse party may not then rest upon the mere allegations or denials of his pleadings. Keller v. Dravo Corp., 441 F.2d 1239, 1244-45 (5th Cir. 1981), cert. denied, 404 U.S. 1017 (1972). Instead, the burden then shifts to the nonmovant to rebut the showing made by the moving party. Sweet v. Childs, 507 F.2d 675, 679 (5th Cir. 1975). The court should view the evidence which is introduced in favor of the party opposing the motion, and the same party must receive the benefit of all favorable inferences that can be drawn from the evidence. Casey Enterprises v. American Hardware Mutual Insurance Co., 655 F.2d 598, 601-02 (5th Cir.

1981); Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. 1981). Summary judgment is improvidently granted unless the moving party demonstrates that there are no disputed facts undergirding the relevant legal questions raised by the pleadings, or otherwise. Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1030-31 (5th Cir. 1982) (Unit B).

D. THE COUNTY'S GROUNDS FOR SUMMARY JUDGMENT

1. Statute of Limitations

The first ground for summary judgment advanced by the county is that at least a portion of the action is subject to a statute of limitations defense. Essential to this

position is the county's contention that a one-year statute of limitations, O.C.G.A. § 36-11-1 (Michie 1982), applies to the case at hand as opposed to a more general twoyear period, O.C.G.A. § 9-3-33 (Michie 1982). Brief in Support of Defendant's Motion for Complete or Partial Summary Judgment at 6. Questions of accrual and tolling aside, the parties do not dispute the fact that some of the events which form the basis of the complaint occurred more than a year before the plaintiff filed suit in federal district court. Plaintiff's Brief in Response to Defendant DeKalb County's Motion for Summary Judgment at 1.

The Georgia statute urged upon the court by the county provides:

All claims against counties must

> be presented within twelve months after they accrue or become payable or the same are barred, provided that minors or other persons laboring under disabilities shall be allowed twelve months after the removal of the disability to present their claims.

Although section 36-11-1 is facially applicable, the county in advocating its adoption in the instant case is confronted with a body of precedent wherein courts generally have ruled that the more general two-year limitations period governs suits brought under 42 U.S.C. § 1983 in Georgia. See, e.g., Leggett v. Strickland, 640 F.2d 774, 775 (5th Cir. 1981) (Unit B); Neel v. Rehberg, 577 F.2d 262, 263 (5th Cir. 1978); Shank v. Spruill, 406 F.2d 756, 757 (5th Cir. 1969). The county seeks to distinguish those past cases on the basis

that individual defendants, rather than counties, were named to defend them.

Federal law does not supply a federal statute of limitations for section 1983 claims. Section 1988 of title 42, U.S.C., however, instructs the federal courts to refer to state law "when federal law provides no rule of decision for actions brought under section 1983." Board of Regents v. Tomanio, 446 U.S. 478, 484 (1980). Thus, in a section 1983 action, a federal court will borrow the statute of limitations applicable to the most analogous state cause of action. See Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-64 (1975).

The appropriate analysis to a-

dopt in determining the applicable statute of limitations in any particular section 1983 action was outlined in Shaw v. McCorkle, 537 F.2d 1289, 1291-93 (5th Cir. 1976). First, the court should determine the essential nature of the asserted claim under federal law. Second, the court then should determine according to state law which state limitations period would be applicable to a like cause of action under state law. Id; see also Braden v. Texas A & M University System, 636 F.2d 90, 92 (5th Cir. 1981). Under the Shaw analysis, section 1983 claims should be viewed as causes of action permitting recovery for injuries to the person. Braden, supra, 636 F.2d at 92;

Monroe v. Pape, 365 U.S. 167, 187 (1961). In accordance with this construction, the most appropriate state statute of limitations to apply in the instant case is section 9-3-33 of the Georgia Code which states:

> Actions for injuries to the person shall be brought within two years after the right accrues, except for injuries to reputation . . . and for injuries to the person involving loss of consortium.

To select section 36-11-1 over section 9-3-33, this court would have to ignore the directive to analogize between federal and state causes of action in favor of the more disjointed process which would result by permitting the identity of defendants to be a factor in selecting the appropriate limitations period.

The statute of limitations peculiar to suits against counties in Georgia is objectionable for a more fundamental reason. In borrowing limitation periods for purposes of section 1983 proceedings, federal courts have been cautioned to avoid applying state statutes which are inconsistent with policies underlying section 1983 as an independent federal remedy. Board of Regents, supra, 446 U.S. at 485; Franklin v. City of Marks, 439 F.2d 665, 668-69 (5th Cir. 1971). By definition, the major policy behind 42 U.S.C. § 1983 is to ensure protection of federally guaranteed rights where the state has foreshortened its own remedies for the invasion of such rights. Monroe, supra, 365 4.5. at 173-74;

see generally Parrat v. Taylor, 451 U.S. 527, 535 (1981). Considering the broad remedial purposes of section 1983, the court holds that it would be anamalous to accord more restrictive remedies against county employees for invasion of constitutional rights than are available under state law against private persons for simple torts.

Even were the court to apply the limitations period advocated by the county, the corresponding tolling rules would then come into play. Board of Regents, supra, 446 U.S. at 485-86; Cobb v. McDonald, 545 F. Supp. 1290, 1291 (N.D. Ga. 1982). Section 9-3-90 of the Georgia Code makes clear that persons who are imprisoned when their causes of action

accrue are entitled to the same time after their disability is removed to bring an action as is prescribed for other persons.[1] Moreover, a related statute provides that the running of an accrued cause of action shall be suspended during subsequent periods of disability. O.C.G.A. § 9-3-1 (Michie 1982).[2] Citing Neel, supra, 577 F.2d 262, the county proceeds with its statute of limitations defense on the assumption that these tolling provisions do not apply to suits brought pursuant to 42 U.S.C. § 1983. However, the Fifth Circuit's decision in Neel has been thoroughly abrogated by the Supreme Court with its holding in Board of Regents, supra, 446 U.S. at 485-86; see also Turner v. Evans,

No. 82-8159, slip op. at 775-76 (11th Cir., Dec. 12, 1983). Although neither the plaintiff nor the county have supplied the court with precise dates, it is obvious that the plaintiff has spent major portions of the time between the accrual of his causes of action and the present in custody as a person imprisoned within the meaning of the relevant Georgia tolling rules. In addition, the county fails to show that it would still be entitled to assert the statute of limitations defense as to any part of the complaint after calculating the extended period available to the plaintiff as a consequence of his disability as a person imprisoned. Assuming arguendo that the shorter limita-

tions period did apply, that failure alone serves as a proper basis to deny the county's motion for summary judgment on the ground of its time-bar defense.

2. Failure to State a Claim for Relief

The second ground for summary judgment advocated by the county is that the plaintiff has failed to state any claim upon which relief can be granted under 42 U.S.C. § 1983. In support of its motion, the county has submitted affidavits from several staff members at the DeKalb County jail as well as verified medical records regarding the plaintiff's treatment while confined at that institution. The cumulative evidence speaks to the general state

of the conditions of confinement as well as to the particular conditions and practices to which the plaintiff was exposed during the periods of time in question. The county's position is that these conditions and practices, taken as a whole, did not deprive the plaintiff of federally protected rights as delimited under section 1983. See Jones v. Diamond, 636 F.2d, 1364, 1368 (5th Cir. 1981), cert. dis., 102 S.Ct. 27 (1982).

Conditions of confinement constitute cruel and unusual punishment where they deprive inmates of the minimal civilized measure of life necessities. Rhodes v. Chapman, 452 U.S. 337, 347 (1981). At this point, the court must note that

neither side to this litigation makes a distinction as to whether the plaintiff was a pre-trial detainee or a sentenced inmate awaiting admission to the state penal system during the time periods pertinent to this inquiry. Instead, both the plaintiff and the county argue their positions by drawing from constitutional standards elicited from the Eighth Amendment. See, e.g., Plaintiff's Brief in Response to Defendant DeKalb County's Motion for Summary Judgment at 6 & 7; Defendant's Brief in Support of Motion for Complete or Partial Summary Judgment at 13. However, it would appear that at least portions of the terms of confinement under scrutiny were served by the plain-

tiff in his status as a pre-trial detainee. As a general rule, the distinction between pre-trial and post-sentence classifications has some import because the Due Process Clause accords, pre-trial detainees rights not enjoyed byh convicted inmates. While a sentenced inmate may be punished in any fashion not cruel and unusual, the Due Process Clause forbids punishment of a person held in custody awaiting trial but not yet adjudged guilty of any crime. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979). For reasons which shall become clear, a ruling upon the instant motion does not necessitate further clarrification of the plaintiff's detention status during the terms of his confinement at the

DeKalb County jail. In addressing the merits of the county's motion, for the sake of clarity the court shall evaluate it separately with respect to each cause of action.

a. OVERCROWDING

The first component of the plaintiff's trinal complaint concerns his allegations that he was subjected to overcrowded conditions of confinement during periods of his incarceration at the DeKalb County jail. To be specific, he maintains that he often was confined in a prison dormitory with an inmate population approximately one hundered percent in excess of design capacity. Addendum to the Complaint. Because of the allegedly cramped quarters, the plaintiff asserts that "the

floor was my bed for approximately two months." Id.

To pierce these allegations, the county has submitted the affidavit of Major Wayne Melton, the jail division commander at the DeKalb County jail. Major Melton purports to be familiar with the facts surrounding the incarceration of the plaintiff at that institution. His affidavit indicates that the plaintiff was housed in either a single-man cell or in a cell east number 2 while confined at the jail. Affidavit of Melton at ¶ 3 & 4. The affidavit also shows that during the relevant period of the plaintiff's confinement in cell east number 2, the prison population in that cell at times exceeded design capacity,

but by no more than about fifty percent. Id. Although the crowding required some inmates to sleep on the floor, Major Melton avers that those inmates were provided with mattresses, sheets and a blanket. Id. at ¶ 3. Further, he surmises that since the bunk beds were claimed by inmates on the basis of seniority, the plaintiff could not have been required to sleep on the floor for a period as long as two months. Id.

The plaintiff's response to the county's motion for summary judgment directly contraverts the material facts underlying the overcrowding issue. As the plaintiff points out in the brief accompanying his responsive pleading, there are dis-

crepancies between the Melton affidavit and other evidence offered by the county. Plaintiff's Brief in Response to Defendant DeKalb County's Motion for Summary Judgment at 1-2. For example, the medical records attached to the affidavit of Doris Payne indicate that the plaintiff was assigned to cell east number 5 during major segments of his confinement at the jail. Exhibits A, C, D & E. Further, contraverting facts offered by the county, the plaintiff has submitted his own affidavit and that of another person, formerly incarcerated at the DeKalb County jail, whose statements under oath provide evidence that the plaintiff was assigned to cell east number 5 sometimes during 1980 and

1981; that at that time the cell held 56 prisoners and provided only 26 beds; and that the shortage of bed space caused the plaintiff to sleep first on a table and then, for over two months, on the floor. Affidavits of Hamm at ¶ 5-7 & of Brown at ¶ 8-9.

Overcrowding is a condition of confinement subject to judicial scrutiny in terms of constitutional propriety. Gates v. Collier, 501 F.2d 1291, 1302 (5th Cir. 1974). On the other hand, design standards do not amount to a per se constitutional limitation on the number of prisoners who may be housed in a particular prison facility. Newman v. Alabama, 559 F.2d 283, 288 (5th Cir. 1977), rev'd in part on other

grounds sub nom. Alabama v. Pugh, 438 U.S. 781 (1978). Instead, the population density of any penal institution is properly evaluated under 42 U.S.C. § 1983 in terms of the impact which an increased population has on the capacity of the designated custodian to deliver life's basic necessities to his charges. Rhodes, supra, 452 U.S. at 348.

Viewing the evidence presented in the light most favorably to the plaintiff, the party opposing summary judgment, the court finds that the plaintiff has contraverted evidence produced by the county and, in the process, has shown that material issues of act remain for trail with respect to the overcrowding claim.

By providing evidentiary support for his allegation that overcrowded conditions at the jail forced him to adopt unorthodox sleeping arrangements for an extended period of time, the plaintiff has presented facts which, if proven, may entitle him to relief. Wright v. El Paso County Jail, 642 F.2d 134, 135 (5th Cir. 1981); Jones, supra, 636 F.2d at 1371 & 1375-76; Ruiz v. Estelle, 503 F. Supp. 1265, 1285-88 (S.D. Tex. 1980), affirmed in part and vacated in part, 679 F.2d 1115 (5th Cir. 1982), cert. denied, 103 S. Ct. 1438 (1983). Therefore, the county's motion for summary judgment must be denied as to the plaintiff's claim regarding over-crowded conditions of confinement. See generally Fed. R. Civ. P. 56(c) & (e).

b. DIET

The second claim advanced by the plaintiff concerns the quality of the diet afforded to inmates at the DeKalb County jail while he was confined there. In his complaint, the plaintiff makes the allegations that "the food was served in a very unsanitary matter [sic]." Addendum to the Complaint. He adds that "many people caught hipetitis [sic] because of the unsanitary." Id.

In its motion for summary judgment, the county again refers to the affidavit of Major Melton in an attempt to pierce the above-quoted allegations thereby showing that the plaintiff has failed to state a viable section 1983 claim with respect to food-handling techniques at the

jail. Due to the rather conclusory nature of the plaintiff's allegations, the county seeks a summary judgment in its favor as to the diet claim on the strength of Melton's averments which outline, in general, the food service procedures employed at the jail during the plaintiff's terms of confinement there. The Melton affidavit indicates that food is placed on steam-cleaned metal trays; that the trays are placed in stainless steel food carts which are scrubbed after each meal; and that the food is distributed by trustee prisoners wearing sanitary coverings on their hands and heads. Affidavit of Melton at ¶ 5.

Despite the generality of the evidence produced by the county, it

is sufficient to pierce the plaintiff's equally vague allegations. However, in opposition to the county's motion for summary judgment, the plaintiff has submitted countervailing evidence. Of particular significance is the affidavit of a former prisoner at the jail that contains the sworn statement that "most of the time the food has fruit files in it." Affidavit of Thomas at ¶ 6. Other averments provided by the plaintiff indicate that the poor quality of the inmates' diet caused various illnesses. Affidavit of Hamm at ¶ 9 & of Thomas at ¶ 5. Still other evidence suggests that the food was poorly cooked, served cold and provided only in small portions. Affidavit of Maddox at ¶ 7.

The Constitution requires that prisoners be furnished with reasonably adequate food. Newman, supra, 559 F.2d at 291. In defining what is reasonably adequate food, it has become settled that cold food, Hiatt v. Vitek, 497 F.2d 598, 601 (1st Cir. 1974); Boston v. Stanton, 450 F. Supp. 1049, 1055 (W.D. Mo. 1978), or food containing an occasional foreign object, Freeman v. Trudell, 497 F. Supp. 481, 482 (E.D. Mich. 1980); Tuggle v. Evans, 457 F. Supp. 1015, 1017 (D. Colo. 1978), lay outside the scope of constitutional protection. Yet, the evidence gathered by the plaintiff goes beyond such pedestrian grumbling. The averments put forward by the plaintiff suggest that the jail food was

habitually adulterated and that its consumption often resulted in illness. Not only do such systematic difficulties state a claim for relief under 42 U.S.C. § 1983, Lovern v. Cox, 374 F. Supp. 32, 35 (W.D. Va. 1974), but the plaintiff's responsive pleading presents evidentiary matter which clearly shows that the issues of fact material to the food claim remain in dispute. Therefore, the county's motion for summary judgment as to this claim must also be denied. See generally Fed. R. Civ. P. 56(c) & (e).

c. MEDICAL

The final claim proferred by the plaintiff concerns the quality of medical care which he received while imprisoned at the DeKalb County

jail. In his complaint, the plaintiff alleges that "the medical facilities were what a person may call nonchalance, unaffectionate toward mankind attitude." Addendum to the Complaint. The complaint, though, is barren of factual allegations expounding upon this conclusory claim.

In light of the manner in which the plaintiff's complaint was drafted, the county's position is that the conclusory nature of his allegations is legally insufficient to state a cause of action under section 1983 for medical mistreatment. Defendant's Brief in Support of Motion for Complete or Partial Summary Judgment at 13. The county supplements their argument with several affidavits. First, Major Melton of-

fers his sworn statements which detail the medical facilities and procedures made available to inmates at the county jail. Affidavit of Melton at ¶ 6. According to his affidavit, the jail infirmary is staffed around the clock by a registered nurse. Id. Moreover, a physician holds sick call a minimum of four days a week while a psychiatrist visits the institution once a week. Id. In addition, the county submits for consideration, the records detailing the medical treatment afforded to the plaintiff during his periods of confinement at the DeKalb County jail. Exhibits attached to the Affidavit of Payne. These records, which begin with an entry dated December 26, 1979 and conclude

with an entry dated February 4, 1982, demonstrate that the plaintiff was a regular visitor to the prison infirmary. Id. On the majority of these visits, it appears that he was administered to by the registered nurse on duty. Id. However, there are numerous entries indicating that the plaitiff occasionally was examined by a physician. See, e.g., Entry dated September 23, 1980, Exhibit F. The records also show that the medical staff entertained complaints ranging from the "hearing of voices" to a toothache, Entry dated May 9, 1981, Exhibit A; Entry dated April 10, 1980, Exhibit F, and, in seeking to treat him for these various problems, they prescribed at least five differenct [sic] types of

medication over the course of time that the plaintiff was under their care. See, e.g., Entries dated January 8, 1981 & January 16, 1981, Exhibit C.

In an attempt to counter the showing of adequate medical care made by the county, the plaintiff offers the following as evidence. To begin with, the plaintiff's own affidavit contains the statement that he "was unable to obtain treatment" of a foot rash which he allegedly contracted while at the jail. Affidavit of Hamm at ¶ 8. Other evidence offered consists of averments by two former DeKalb County inmates who attest, contradictorily, to the general difficulties they experienced in securing an

appointment with the physician on duty at the jail. Affidavit of Clark at ¶ 7 & of Brown at ¶ 6.

Deliberate indifference to serious medical needs of prisoners constitutes cruel and unusual punishment proscribed by the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104 (1976). In promulgating this standard, the Supreme Court was considering the rights of convicted persons. The standard by which to measure the medical attention that must be accorded to pre-trial detainees has never been spelled out by that Court. In Jones, supra, 636 F.2d at 1378, the Fifth Circuit suggested that pre-trial detainees are entitled to reasonable medical unless the failure to supply it is

reasonably related to a legitimate government objective.

Pretermitting the effort to apply the Jones standard to the undisputed facts regarding the plaintiff's medical claim, the court finds that the evidence produced by the county supports a motion for summary judgment in its favor as to that claim because the plaintiff has not shown as an element of the county's liability the degree of causation required by the express language of 42 U.S.C. § 1983. Monell, supra, 436 U.S. at 691-92. Causation against a govermental entity may be established by showing that a plaintiff's injury resulted from execution of an official policy or informal custom. McLaughlin v.

City of LaGrange, 662 F.2d 1385, 1388 (11th Cir. 1981), cert. denied, 456 U.S. 979 (1982); see also Jones v. Evans, 544 F. Supp. 769, 776-77 (N.D. Ga. 1982). In support of its motion, the county has provided records which demonstrate a regimen of treatment made available to the plaintiff that, at a minimum, inducate [sic] he was afforded relatively free access to medical care. In rebuttal, the only specific fact offered by the plaintiff that arguably contraverts the county's showing concerns a failure to treat a rash. Moreover, the plaintiff's averment in this regard is ambiguous because the court could infer from it that the medical staff at the jail was either medically negligent

in failing to successfully treat the rash or deliberately indifferent by consciously withholding any treatment whatsoever for the rash. Because the plaintiff does not dispute the accuracy of the medical records offered by the county and they indicate that the plaintiff was prescribed an antipruritic during his confinement at the jail, Entry dated November 13, 1980, Exhibit D, the court adopts the former construction as providing the only credible evidence on behalf of the plaintiff.

What emerges from the verified medical records and affidavits filed by the parties is a pattern of examinations and treatments provided to an inmate who presented the staff at

the DeKalb County jail with numerous, often vague, complaints regarding his health. It is clear that the plaintiff was not always given the course of treatment (for example, hospitalization) he deemed appropriate. Entry dated September 24, 1980, Exhibit F. It is equally clear that he often refused medication prescribed for him. See, e.g., Entry dated February 17, 1981, Exhibit B. Finally, the conclusion can be drawn that the various treatment modalities selected for the plaintiff met with mixed results.

Whether the plaintiff was subjected to the above-described medical care during his status as a pre-trial detainee or as a convicted inmate, the undisputed facts suggest

that the plaintiff has not stated a claim cognizable under section 1983. Compare Estelle, supra, 429 U.S. at 104-05 with Jones, supra, 636 F.2d at 1378. Where a state prisoner has received medical attention and the dispute is over the adequacy of that treatment, federal courts should be relunctant to constitutionalize the claim by allowing the claim to proceed. Layne v. Vinzant, 657 F.2d 468, 474 (1st Cir. 1981); see also Bass v. Sullivan, 550 F.2d 229, 232-33 (5th Cir.), cert. denied, 434 U.S. 864 (1977). Rather than rest a decision to grant summary judgment for the county on this ground however, the court finds that the undisputed material facts show no affirmative involvement of

the county by condonation through official policy or informal custom with the medical grievance cited by the plaintiff. Walters v. City of Ocean Springs, 626 F.2d 1317, 1323 (5th Cir. 1980). The failure to prescribe an effective medication for the plaintiff's dermatitis represents a compartmentalized aspect of the entire course of medical care afforded to him. While accepting this failure to be an uncontroverted fact, there is no reasonable inference which arises therefrom that suggests a constitutionally impermissible policy or custom which might be attributed to the county that may fairly be said to have inflicted the injury. Because the material facts above are not in dis-

pute and the law as applied to those facts points to the conclusion that the county is entitled to judgment as a matter of law with respect to the medical claim, the county shall be granted partial summary judgment.

IV. MOTION FOR ACCESS TO COUNSEL

The plaintiff has submitted a motion, dated September 9, 1983, requesting an order from this court requiring John Lewis Weldon, Warden of the Coastal Correctional Institution in Garden City, Georgia, to allow the plaintiff to have access to a telephone so that he might contact his appointed counsel to assist with the maintenance of this suit. Putting aside an inquiry into the merits of the unopposed motion, the

court notes that it is without jurisdiction to entertain the request. 28 U.S.C. § 1391(b) (1970). Therefore, the plaintiff's motion for access to counsel shall be denied.

V. CONCLUSION

Accordingly, it is hereby ORDERED that the defendant county's motion for summary judgment be GRANTED as to that defendant insofar as the plaintiff's complaint raises issues over medical care available to him during his terms of confinement at the DeKalb County jail. It is further hereby ORDERED that the remaining portion of the defendant county's motion for summary judgment be DENIED to the extent that the

county seeks judgment in its favor regarding issues raised by the plaintiff concerning overcrowded conditions and the type of diet to which he was exposed during the periods while he was incarcerated at the DeKalb County jail. Finally, it is further hereby ORDERED that the plaintiff's motion for access to counsel be DENIED.

AND IT IS SO ORDERED, this 5 day of January, 1984.

/s/ Robert H. Hall
ROBERT H. HALL
UNITED STATES DISTRICT COURT

FOOTNOTES

1/ Minors, persons who are legally incompetent because of mental retardation or mental illness, or persons imprisoned, who are such when the cause of action accrues, shall be entitled to the same time after their disability is removed to bring an action as is prescribed for other persons.

2/ If any person specified in Code Section 9-3-90 after his right of action has accrued and the disability is

not voluntarily caused or undertaken by the person claiming the benefit thereof, the limitation applicable to his cause of action shall cease to operate during the continuance of the disability.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGE HAMM,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
vs.	)	
	)	NO. C81-1415a
DEKALB COUNTY and	)	
PAT JARVIS, Sheriff,	)	
	)	
Defendants.	)	

ORDER

This action was tried on July 2-3, 1984, to the court without a jury. The court hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Plaintiff filed this 42 U.S.C. § 1983 action on July 27,

1981, alleging certain wrongful conditions and practices in existence during his confinement in the DeKalb County Jail in Decatur, Georgia. He requested compensatory damages, attorney's fees, and costs. All jurisdictional prerequisites to federal suit were met.

2. Plaintiff was incarcerated at the DeKalb County Jail at various times in 1979, 1980, and 1981, including the following dates: December 23, 1979, through January 3, 1980; February 11, 1980, through April 14, 1980; September 23, 1980, through February 8, 1981.

3. Pat Jarvis has been continuously employed as the Sheriff of DeKalb County since January 1, 1977, and, as Sheriff, is charged with the

responsibility of maintaining the DeKalb County Jail under Georgia law.

4. DeKalb County, through its Board of Commissioners, provides the funding for the DeKalb County Jail and is involved with establishing the policies, practices and procedures under which the jail must operate.

5. At all times relevant to the Complaint, the DeKalb County Jail was supervised by Sheriff Pat Jarvis and the DeKalb County Board of Commissioners. The conditions present at the jail were a consequence of the policies, practices, and procedures followed by Sheriff Jarvis and the Board.

6. While at the jail, plaintiff spent the majority of his time in

cells East #2 and East #5. These cells had design capacities of 20 and 24 inmates, respectively. The cells' respective inmate population reached 35 and 38 during plaintiff's confinement therein.

7. As a consequence of the overpopulation, plaintiff frequently slept on an eating table or on a mattress placed on the floor. Both the floor and the linens provided were often unsanitary. Plaintiff did not, however, suffer specific physical injury or illness as a result of these conditions.

8. Regarding the food served to plaintiff at the DeKalb County Jail, the jail served three meals a day, consisting of a total of 2,600 calories. While plaintiff occasionally

found foreign matter in his food and while the jail's food preparation and storage often failed to meet Georgia Department of Human Resources Food Preparation Standards, plaintiff did not become seriously ill as a consequence of the jail's food service practices.

9. Regarding plaintiff's alleged mental breakdown due to conditions at the DeKalb County jail, the DeKalb County Jail conditions did not seriously aggravate the mental and physical problems plaintiff suffered before being incarcerated.

Conclusions of Law

1. The court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343(a)(b) (1976).

2. Although the inmate population of the cells in which plaintiff was retained at times exceeded their respective design capacities, design standards do not amount to a per se constitutional limitation on the number of prisoners who may be housed in a particular prison facility. Newman v. State of Ala., 559 F.2d 283, 288 (5th Cir. 1977). Unless the excess over capacity inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of the crime, general considerations of the limited space fall far short of proving a constitutional violation, Rhodes v. Chapman, 452 U.S. 337 (1981). Standing alone, the fact that plaintiff may have been required to sleep at times upon

a mattress on the floor or upon a table temporarily is not such a condition which shocks the conscience so as to fall within the prohibition against cruel and unusual punishment. Crowe v. Lech, 540 F.2d 740 (4th Cir. 1976).

3. The Constitution requires that prisoners be furnished with reasonable adequate food. Newman v. Alabama, 559 F.2d 283, 288 (5th Cir. 1977) rev'd in part on other grounds sub nom. Alabama v. Pugh, 438 U.S. 781 (1978). However, a well-balanced meal, containing sufficient nutritional value to preserve health is all that is required. Smith v. Sullivan, 554 F.2d 373, 380 (5th Cir. 1977). Plaintiff's occasional discovery of foreign objects does

not establish a constitutional violation. Hiatt v. Vitek, 479 F.2d 598, 601 (1st Cir. 1974).

4. A plaintiff suing for violations of his or her civil rights under 42 U.S.C. § 1983 is entitled to compensatory damages only upon proof of actual injury. Families Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980). Plaintiff has not proven he suffered a specific illness, injury or damage as a consequence of the sleeping arrangements or food served at the DeKalb County Jail. Accordingly, the court concludes that plaintiff has not been deprived of constitutional rights and is not entitled to a compensatory damage award under § 1983.

5. Plaintiff, not having pre-

vailed on his claims, is not entitled to an award of attorney's fees or costs, pursuant to a 42 U.S.C. § 1988 (1976) or 28 U.S.C. § 1915(d) (1976).

JUDGMENT

For the reasons set forth in the accompanying Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED and DECREED that judgment be entered in favor of defendant.

So ORDERED, this 31 day of July, 1984.

/s/ Robert H. Hall
ROBERT H. HALL
UNITED STATES DISTRICT COURT

APPENDIX D

T-19, L. 19-21

Q. What was your diagnosis of him?

A. Schizophrenia. Chronic undifferentiated type, in partial remission.

T-20, L. 12-15

Q. . . . Mr. Hamm, whom you have indicated was diagnosed as shizophrenic.

A. Schizophrenic. Chronic undifferentiated type, in partial remission.

Q. Yes; as a consultant, yes.

Q. All right. And maintained as a part of the records of this prison, is that correct?

A. Yes.

Q. Were they made by you at a time in which your memory was fresh as to what you had done and what you had diagnosed and prescribed?

A. Yes. My practie was to make the notes immediately after either seeing the patient or, depending upon the numbers of patients waiting, always to complete the notes before I left the jail on that day.

Q. Did you make a diagnosis of Mr. Hamm?

A. Yes, I did.

T-20, L. 20-24

Redirect Examination

By Mr. Dillard:

Q. Do you remember what cells he was in when you examined him or did you just --

A. No. I would have examined him in the medical office.

AFFIDAVIT OF MAILING UNDER RULE 28.2
AND CERTIFICATE OF SERVICE

STATE OF GEORGIA
COUNTY OF FULTON

Before me, the undersigned authority authorized to administer oaths, personally appeared Stephen E. O'Day, a person known to me, who, after being first duly sworn, stated the following:

1.

I certify that I am a member of the Bar of the Supreme Court of the United States.

2.

I hereby certify that the original and forty (40) copies of the Petition for Writ of Certiorari prepared by me on behalf of George Hamm, were delivered by hand, via Federal Exprsss, to the Clerk of the United States Supreme Court, 1 First Street,

N.E., Washington, D.C. 20543, within the time allowed for filing and mailing took place before that time.

3.

I further certify that three (3) copies of the Petition for Writ of Certiorari were also served on January 30, 1986, by United States mail with proper postage prepaid and affixed, on each of the following persons at the following addresses:

George P. Dillard, Esq.
Richard W. Calhoun, Esq.
Dillard & Associates
ATTORNEYS FOR DEKALB COUNTY AND PAT JARVIS, SHERIFF, RESPONDENTS
Suite 202
246 Sycamore Street
Decatur, Georgia 30030

Dated this 30th day of January, 1986.

Stephen E. O'Day

Stephen E. O'Day

Sworn to and subscribed
before me this 30th day
of January, 1986.

Notary Public

My Commission Expires:

Notary Public, Georgia, State at Large
My Commission Expires Nov. 27, 1988

(2)

Supreme Court, U.S.
FILED
MAR 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1348

In The

Supreme Court of the United States

January Term, 1986

George Hamm,

Petitioner,

vs.

DeKalb County, Georgia
Pat Jarvis, Sheriff,

Respondents.

Response in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

Albert Sidney Johnson
County Attorney

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23pp

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for the Eleventh Circuit

STATEMENT OF CASE

The procedural history preceding this petition for writ of certiorari has been detailed in petitioner Hamm's statement of the case. Petitioner Hamm was confined in the DeKalb County Jail on

several occasions from 1979 through 1982. The pertinent periods of incarceration in this appeal ran from February 11, 1980 to April 14, 1980 and from September 23, 1980 to May 20, 1981, which included time both before and after Hamm's criminal conviction. Hamm, who is presently confined in a state prison facility, brought suit under §1983 against the sheriff and the county, contending his constitutional rights under the Eighth and Fourteenth Amendments were violated during the time he was confined in the county jail, as a result of medical care, diet, and shelter conditions.

Following a hearing in the district court, that court entered findings that, because the county jail population had exceeded its design capacity at times during periods of Hamm's confinement, he

had been required to sleep on a mattress, either on the floor or on a table. However, the district court expressly found that Hamm did not suffer any special physical injury or illness as a result of these overcrowded conditions.

Regarding food service, the district court found:

> [T]he jail served three meals a day, consisting of a total of 2,600 calories. While plaintiff occasionally found foreign matter in his food and while the jail's food preparation and storage often failed to meet Georgia Department of Human Resources Food Preparation Standards, plaintiff did not become seriously ill as a consequence of the jail's food service practices.
>
> Hamm v. DeKalb County, Civil Action No. C81-1415A (N.D. Ga., July 31, 1984)

The evidence before the district court revealed that the county jail was staffed around-the-clock by a registered nurse, and that a physician held sick call at the jail on a minimum of four

days per week. In addition, a psychiatrist visited the jail once a week. Hamm's jail medical records indicated that he regularly visited the jail infirmary, complaining of various matters ranging from the "hearing of voices" to a toothache. On the majority of his visits, Hamm was treated by a registered nurse; however, the records indicated that, on occasion, he was also examined by the jail physician.

After considering the evidence concerning the medical services available at the jail in general, and Hamm's treatment in particular, the district court concluded that the records revealed:

> ...a pattern of examinations and treatments provided to an inmate [Hamm] who presented the staff at the DeKalb County jail with numerous, often vague, complaints regarding his health. It is clear that the plaintiff was not always given the course of treatment (for example, hospitalization) he deemed appropriate.... It is equally clear

> that he often refused medication prescribed for him.... Finally, the conclusion can be drawn that the various treatment modalities selected for the plaintiff met with mixed results." Hamm v. DeKalb County, Civil Action No. C81-1415A (N.D. Ga., July 31, 1984)

Based upon its review of the evidence, the district court concluded the conditions at the county jail neither seriously aggravated Hamm's physical or mental problems, nor caused him to suffer any special physical injury or illness. The court found Hamm had not been deprived of his constitutional rights and, consequently, entered judgment in favor of the respondents.

In affirming the district court's decision, the Eleventh Circuit Court of Appeals noted that, while the district court had not expressly considered Hamm's medical treatment claims in combination with his other claims, as would be consistent with a "totality of

conditions" approach, the evidence was clear that the totality of such jail conditions "did not fall below constitutional standards." Hamm v. DeKalb County, 774 F.2d 1567, 1576 (11th Cir. 1985).

SUMMARY OF ARGUMENT

The Eleventh Circuit correctly held that the minimum standards for the provision of such basic necessities as food, shelter, and medical care to county jail inmates are the same under both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, and that petitioner Hamm failed to show a violation of his constitutional rights. There is no public policy or other basis which would justify affording pre-trial detainees a higher standard of care, in the provision of food, shelter, and medical care, than is provided to convicted persons. To the contrary, since "life and health are just as precious to convicted persons as to pre-trial detainees", public policy and humanitarian concerns demand that all prisoners be entitled to a reasonably

adequate diet and living space, as well as protection against deliberate indifference to their serious medical needs.

Petitioner has not only failed to show the existence of egregious conditions of confinement, but also did not prove any personal injury or damage resulting from the conditions of which he complained. The Eleventh Circuit correctly reviewed the evidence in light of the "totality of conditions" test, and found petitioner's claims legally insufficient under §1983.

REASONS FOR DENYING WRIT OF CERTIORARI

A. The Eleventh Circuit correctly held that, in regard to the provision of such basic necessities as food, living space, and medical care, the minimum standards are the same under the due process clause and the Eighth Amendment.

The Eleventh Circuit Court of Appeals, while recognizing the limitations imposed by the Eighth Amendment and the Due Process Clause arise in different contexts, found the two provisions to necessarily yield the same result with respect to the provision of such basic necessities as food, shelter, and medical care. Hamm v. DeKalb County, supra, at 1574. This conclusion was premised upon a recognition that:

> Distinguishing the Eighth Amendment and due process standards in this area would require courts to evaluate the details of slight differences in conditions. Many city and county jails have convicted prisoners and pre-trial detainees. That approach

> would result in the courts' becoming 'enmeshed in the minutiae of prison operations', a situation against which the Supreme Court has warned. Therefore, the level at which states provide pre-trial detainees with basic necessities - in addition to being 'reasonably related to a legitimate governmental objective' - must meet the standards supplied under the eighth amendment prohibition on cruel and unusual punishment, i.e., they must furnish the detainees with a reasonably adequate diet and living space, and with reference to medical needs, they must not be deliberately indifferent to detainees' serious medical needs. Life and health are just as precious to convicted persons as to pre-trial detainees.
> Hamm v. DeKalb County, supra, at 1574

The Eleventh Circuit's analysis is consistent with the decisions of this Court regarding the proper standards to be applied under the Fourteenth Amendment. While a pre-trial detainee may not be subject to conditions amounting to punishment:

> Not every disability imposed during pre-trial detention amounts to 'punishment' in the constitutional sense....And the fact that such detention interferes with the

> detainees' understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment'."
>
> Bell v. Wolfish, 441 U.S. 520, 537, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

In City of Revere v. Massachusetts General Hosp., ____ U.S. ____, 103 S.Ct. 2979 (1983), this Court considered whether the due process rights of an individual who had been injured while being apprehended by the police had been adequately protected. While declining to precisely define the state's due process obligations to pre-trial detainees requiring medical care, this Court held such obligation to be "at least as great as the Eighth Amendment protections available to a convicted prisoner." Supra, at 103 S.Ct. at 2983.

More recently, in considering whether an inmate's due process rights under the

Fourteenth Amendment were violated when prison officials failed to protect him from another inmate, this Court held "the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials" and therefore found the inmate's claim did not approach that sort of abusive governmental conduct that the due process clause is designed to prevent. Davidson v. Cannon, ____ U.S. ____, 106 S.Ct. 668 (1986); see also Daniels v. Williams, ____ U.S. ____, 106 S.Ct. 662 (1986).

Hamm's claims that his food occasionally contained foreign objects, that he was required to sleep on a mattress on the floor or a table during periods of jail overcrowding, and that he did not obtain what he considered to be appropriate treatment or medication for

his disorders, do not rise to the level of a constitutional violation. There has been no showing of an abuse of governmental power here, and such a showing is an essential element under §1983. Monroe v. Pape, 365 U.S. 167, 172, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

B. There is no conflict between the totality of conditions analysis applied by the Eleventh Circuit Court of Appeals and the decisions of the Fifth Circuit Court of Appeals.

Petitioner Hamm complains that the Eleventh Circuit failed to apply the "totality of conditions" test espoused in Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982), cert. denied, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983). Respondents are unclear as to petitioner's basis for contending the Eleventh Circuit failed to apply this test, as that Court expressly found that

"it is clear from the district court's finding on the individual claims that the conditions - in combination - did not fall below constitutional standards." Hamm v. DeKalb County, supra, at 1575-1576.

Where a state prisoner has received medical attention, but disputes the adequacy of the treatment, federal courts should be reluctant to "second guess" medical judgment and, thus, constitutionalize claims that sound in tort law. Layne v. Vinzant, 657 F.2d. 468, 474 (1st Cir. 1981); Westlake v. Lucas, 537 F.2d. 857, 860 n.5 (1st Cir. 1981). Because food may occasionally be served cold or contain foreign objects, while unpleasant, does not amount to a constitutional deprivation. Hoitt v. Vitek, 497 F.2d 598, 601 (1st Cir. 1974). The Constitution requires that

prisoners be provided "reasonably adequate food", consisting of a well-balanced meal, containing sufficient nutritional value to preserve health..." Jones v. Diamond, 636 F.2d 1364, 1378 (5th Cir.) (en banc) cert. granted, 452 U.S. 959, 101 S.Ct. 3106, 69 L.Ed.2d 970, cert. dismissed, 453 U.S. 950, 101 S.Ct. 27, 69 L.Ed.2d 1033 (1981); Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977).

The district court and Court of Appeals properly found Hamm's claims concerning sleeping arrangements and overcrowding to be insufficient. In reviewing claims of unconstitutionally overcrowded jails, courts must consider the impact of such alleged overcrowded condition on the facilities' ability to provide basic necessities, such as food, medical care, and sanitation. See Rhodes

v. Chapman, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). The fact that overcrowded conditions at the jail caused Hamm to have to temporarily sleep upon a mattress on the floor or on a table does not create a constitutional violation where there has been no showing that such conditions were imposed arbitrarily or resulted in harm or injury to him.

Whether considered separately or in combination, petitioner Hamm has simply failed to prove a violation of his rights under either the Eighth or Fourteenth amendments to the United States Constitution.

CONCLUSION

There are no special or important issues here deserving review by this Court. The District Court and Eleventh Circuit Court of Appeals correctly found petitioner Hamm's claims to be

insufficient under §1983. Respondents thus respectfully urge the Court to deny the petition for writ of certiorari presently pending on behalf of George Hamm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As a member of the Bar of the United States Supreme Court, I hereby certify that on the 10th day of March, 1986, three copies of the enclosed Response in Opposition to Petition for Writ of Certiorari were mailed first class, postage prepaid, to:

Stephen E. O'Day
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& Cadenhead
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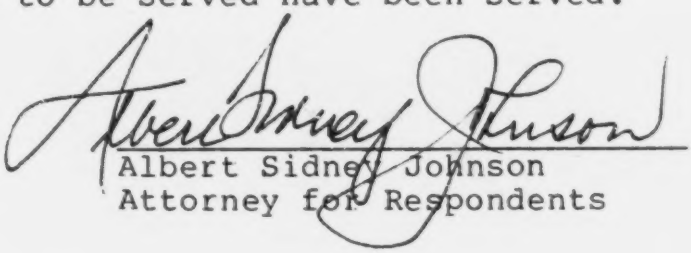
Atlanta, Georgia 30043

I further certify that all parties required to be served have been served.



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